



# THE ATTORNEY GENERAL OF TEXAS

AUSTIN 11, TEXAS

PRICE DANIEL  
ATTORNEY GENERAL

May 8, 1947

Hon. C. H. Cavness  
State Auditor  
Austin, Texas

Opinion No. V-191

Re: Whether the liquidator and those functioning under him under Art. 5068c, V.C.S., constitute a state agency within the meaning of Arts. 4413a-8 through 4413a-23, V.C.S., and Art. 422b, V.P.C., prescribing the duties and authority of the State Auditor.

Dear Sir:

You request advice as to whether the "Liquidating Division" of the Board of Insurance Commissioners as presently constituted is a state agency under the general terms of the statutes. After quoting from the provisions of House Bill No. 249, Chapter 3, Acts 46th Legislature, Regular Session, 1939, page 389, which is published as Article 5068c of Vernon's Civil Statutes, providing for a statutory liquidator for insurance companies in receivership, you further point out as follows:

"The Departmental Appropriation bill for the current biennium for the Board of Insurance Commissioners carries the following item:

'33. For enforcement of Conservator Act as per H. B. 249, 46th Legislature, \$6,000.00.'

The special rider in the Life Division Section contains the following language:

' . . . There is hereby appropriated out of the General Revenue Fund for each year of the biennium beginning September 1, 1945, the sum of \$6,000.00 or so much thereof as may be necessary for the use of the Board of Insurance Commissioners in the enforcement of House Bill 249, Acts of the Regular Session, 46th Legislature. In order to reimburse the general revenue because of any withdrawals from said appropriations, it shall be the duty of the Board of Insurance Commissioners to deposit to the credit of the General Revenue Fund all of the assets recovered under the terms of said House Bill 249.'

"The Liquidator appointed by the Board of Insurance Commissioners also serves as Legal Examiner for the Board. He is paid a salary at the rate of \$5,200.00 per annum, paid monthly as follows:

'Conservator' - out of General Revenue Fund	\$144.45
'Legal Examiner' - out of Examination Fund	<u>288.88</u>
Total monthly salary	<u>433.33</u>

That portion of the salary paid as 'Conservator', out of the General Revenue is subsequently refunded to the General Revenue Fund out of assets of insurers in liquidation or under conservatorship, under the provisions of the appropriation rider quoted above.

"The Liquidating Division occupies offices in the Tribune Building in the City of Austin. The Liquidator occupies an office in the Land Office Building with the Board. There are six administrative employees in the offices in the Tribune Building and one attorney who acts as legal counsel for the Liquidator. Warehouse space is rented at 316½ South Congress Avenue in Austin at a monthly rental rate of \$25.00. There is one employee in charge of the warehouse. The warehouse rental and all salaries

and other expenses of the Liquidating Division are paid out of funds realized from the assets of insurers in process of liquidation, except for the space occupied in the Tribune Building, which space is furnished by the State of Texas.

"The Liquidator is appointed by the Board of Insurance Commissioners and his salary fixed by said Board. All other assistants are appointed by the Liquidator with advice and consent of the Board. Thus it will be seen that no direct appropriations are made from State Funds for the operation and maintenance of the Liquidating Division."

You have indicated by a conference in connection with this request that you are concerned about the duties, responsibility and authority of the State Auditor in connection with the activities of the "Liquidating Division"

It will be noted that there is no agency designated by statute as a "Liquidating Division". We do not construe Article 5068c as creating a "Liquidating Division" as an integral part of the organization of the Insurance Department, nor do we construe this statute as including the activities of the Liquidator and those functioning under him as a part of the duties of the Board of Insurance Commissioners. The Liquidator functions under the control of the Court, his activities being subject in several respects to supervision by the Board of Insurance Commissioners. He, and those functioning under him by virtue of this statute, are appointed by the Board of Insurance Commissioners; and their compensation is fixed by the Board. But the statute contemplates that the Liquidating personnel are to be paid out of the assets of the receiverships in their hands and their duties are for practical purposes those of the classic receiver operating as an agent of the court, subject to certain special provisions as set out in the statutes.

The Act contemplates that the funds and property in the custody of the Liquidator shall be those of private concerns, and not state-owned property nor state funds.

We assume from your statement that you are concerned with the activities of the Liquidator as such, and

not with such activities as are contemplated on the part of the Board of Insurance Commissioners in connection with their prescribed duties under the Act, since the activities of the Board of Insurance Commissioners are of course subject to the full force of the Act prescribing the duties of the State Auditor.

We believe that the Liquidator and those operating under him are state agents and employees since their official character is defined by statute and their functions and authority are set into operation by state agencies, namely: the Board of Insurance Commissioners and the Court. However, the activities and functions should be considered separate, distinct and peculiar for purposes of determining the duties and responsibilities of the State Auditor in connection therewith.

In order to determine the extent of the responsibilities of the State Auditor, we have examined the provisions of Senate Bill 27, Chapter 293, Acts 48th Legislature, Regular Session, 1939, page 429, published as Articles 4413b-1 through 4413b-23 of Vernon's Civil Statutes and Article 422b of Vernon's Penal Code. The caption of the Act describes it as "providing a more efficient fiscal system for the State of Texas including (but not excluding other things) a uniform system of accounting." The State Auditor is in effect an arm or agency of the Legislature. Under Section 2 of the Act is created a Legislative Audit Committee composed entirely of members of the Legislature, and by Section 3 of the Act, it is provided that the State Auditor shall be appointed by such Legislative Audit Committee. He is therein described as "an investigator of all custodians of public funds, disbursing agents, and personnel of departments." (Emphasis supplied throughout this opinion.)

Section 7 provides in part:

"The State Auditor is hereby granted the authority and it shall be his duty:

"1. To perform an audit of all accounts, books and other financial records of the State Government of any officer of the state, department, board, bureau, institution, commission, or agency thereof,

and to prepare a written report or reports of such audit or audits to the Legislative Audit Committee and such other person or persons hereafter designated in this bill.

"2. To . . . examine and audit all fiscal books, records and accounts of all custodians of public funds, and of all disbursing officers of this state, making independent verifications of all assets, liabilities, revenues and expenditures of the State, its departments, boards, bureaus, institutions, commissions or agencies thereof now in existence or hereafter created.

"3. To require such changes in the accounting system or systems and record or records of any office, department, board, bureau, institution, commission or state agency, that in his opinion will augment or provide a uniform, adequate, and efficient system of records and accounting.

"4. . . . .

"5. To require the aid and assistance of all executives and officials, auditors, accountants and other employees of each and every department, board, bureau, institution, commission or agency of the State at all times in the inspection, examination and audit of any and all books, accounts and records of the several departments.

"The State Auditor shall have access at all times to all of the books, accounts, reports, confidential or otherwise, vouchers, or other records of information in any state office, department, board, bureau, or institution of this state. . .

". . . . It is the object and purpose of this Act among other things to install a unified and co-ordinated system of accounting and records in every department, bureau, board, and institution of the State Government. . . ."

Section 8 provides in part:

"In addition to the other duties provided for the State Auditor, he shall thoroughly examine all departments of the State Government with special regard to their activities and the duplication of effort between departments and the quality of service being rendered by subordinate employees in each of the several departments.

"Upon completing the examination of any department, he shall furnish the heads thereof with a report of, among other things, (a) the efficiency of the subordinate employees; (b) the status and condition of all public funds in charge of such department; (c) the amount of duplication between work done by the departments so examined and other departments of the State Government; (d) the expense of operating the department; (e) breaches of trust and duty, if any, by an officer, department, institution, board, bureau, or other custodian or disbursement officer of public funds; (f) any suggested changes looking toward economy and reduction of number of clerical and other employees and the elimination of duplication and inefficiency

. . . . .

"Reports shall also contain specific recommendations to the Legislature for the amendment of existing laws or the passage of new laws designed to improve the functioning of various departments, boards, bureaus, institutions or agencies of the State Government to the end that more efficient service may be rendered and the cost of government reduced.

"All recommendations submitted by the State Auditor shall be confined to those matters properly coming within his jurisdiction, which is to see that the laws passed by the Legislature dealing with the expenditure of public moneys are in all respects carefully observed, and that the

attention of the Legislature is directed to all cases of violation of the law and to those instances where there is need for a change of existing laws or the passage of new laws to secure the efficient spending of public funds. . . .

All reports by the State Auditor shall call attention to any funds, which, in his opinion, have not been expended in accordance with law or appropriation by the Legislature; and shall make recommendations to the Legislature as to the manner or form of appropriations, which will avoid any such improper expenditures of money in the future . . . ."

In Section 10, it is provided:

"If the State Auditor finds in the course of his audit evidence of improper practices of financial administration or of any general incompetency of personnel, inadequacy of fiscal records, he shall report same immediately to the Governor, the Legislative Audit Committee, and the Department head or heads affected. If the State Auditor shall find evidence of illegal transactions, he shall forthwith report such transactions to the Governor, the Legislative Audit Committee and the Attorney General.

"Immediately upon receipt of a report from the State Auditor of incompetency of personnel and inadequacy of fiscal records, the Legislative Audit Committee shall review the State Auditor's report of same and hold hearings with the Department head or heads concerning such incompetency and inadequacy of fiscal records. The Legislative Audit Committee, after holding such hearings, shall make a report to the Department head or heads requesting the removal or replacement of the incompetent personnel or the installation of the necessary fiscal records. The Legislative Audit Committee shall report to the Legislature any refusal of the Department officials to remedy such incompetency or the installation of proper fiscal records."

The State Auditor is subject to removal by the Legislative Audit Committee. By Section 14, it is made a misdemeanor to refuse the State Auditor access to the records of any unit of the State.

Section 18 provides:

"Wherever the word 'department', 'board', 'bureau', 'institution', 'commission', or other word or words of similar import appear in any prior section of this Act, such shall mean each and every department, board, bureau, institution, commission or agency of the State Government."

The Act repeals the former Acts creating the State Auditor and Efficiency Expert, which was of similar import, but it is obviously intended to continue many of the duties of the State Auditor and Efficiency Expert, subject to certain modifications and clarification of his duties as set out in the present Act.

From the quoted provisions, we construe this Act to be primarily concerned with the handling of public funds and state revenues, the proper disbursement of legislative appropriations, and with general efficiency and elimination of duplication of employees in order to affect economy in the operation of the State Government. While the language of the Act is very broad and the authority and duties of the Auditor are extensive, we believe that the Auditor's responsibility ends at the point where the functions of any agency cease to affect such public funds and revenues. In speaking of the efficiency of personnel and of the operations of any State agency, we believe that the Legislature had in mind efficiency in so far as unnecessary or illegal expenditures of public funds are being made. With many State agencies, this would carry the Auditor into an examination of every activity and every phase of the functions of such agency, since inefficient personnel or operations would constitute an unnecessary drain upon public revenues.

However, in the case of the operations of the statutory Liquidator, public funds are only remotely involved. We do not believe that the Auditor is required or warranted to interfere with the administration of

the receiverships in the hands of the Liquidator except to the extent necessary to determine that any public funds involved are appropriately handled.

This Department held on somewhat different grounds in Opinion No. 0-3536, rendered under a former Attorney General, that the State Auditor had no responsibility or duty to make an audit of the Tyler Field Office of the Governing Committee of Salt Water Control of the East Texas Oil Field. In that instance the Governing Committee for Salt Water Control was a non-statutory committee made up of a number of State officials under the terms of an agreement entered into in a lawsuit whereby the State was attempting to prevent pollution of the Neches River by oil operations. No state revenues or public funds were involved. The question arose under House Bill 170 of the First Called Session of the 31st Legislature, Acts 1929, Chapter 91, which was the Act creating the former office of State Auditor and Efficiency Expert. As before mentioned, its terms were of like import, in so far as material here, to the present Act creating the office of State Auditor. There, as in the present situation, the agency's functions were largely those of the Court in the determination of the litigants' rights, and the agency handled only private funds.

In conclusion, we deem it appropriate for the State Auditor to extend his inquiry into the affairs of the Liquidator, and those functioning under the Liquidator, sufficiently to determine that public funds are being properly handled, that expenditures under the Appropriation Acts are being properly made, that no duplication of personnel or inefficiency exists of a nature constituting a drain upon public funds, and that State-owned property is being used for proper purposes. We also believe that the authority to require changes in the accounting system or systems and records of an agency applies to the system of handling public funds and systems, the administration of which is a burden on state revenues, and that the authority does not apply to the system set up by the Liquidator for handling the receivership funds and property in the hands of the Liquidator.

We also call your attention to Opinion No. 0-3695, rendered under a former Attorney General, holding on constitutional grounds in effect that such receivership proceedings are functions of the judiciary,

not subject to undue interference by other departments of government.

SUMMARY

The Liquidator, and those functioning under him under Article 5068c, V. C. S. (House Bill 249, Chapter 3, Acts 46th Legislature, 1939, page 389) are agencies of the State within the meaning of Articles 4413a-8 through 4413a-23, V. C. S., and Article 422b, V. P. C. (Senate Bill 27, Chapter 293, Acts 48th Legislature, Revised Statutes, 1943, page 429) defining the duties and responsibility of the State Auditor. However, the State Auditor's duties, applicable to the Liquidator's functions, extend only to a determination that public funds are being properly handled, that legislative appropriations are being properly expended, that no duplication of personnel or inefficiency exists constituting a drain on public funds, and that State-owned property is being used for proper purposes.

Yours very truly,

ATTORNEY GENERAL OF TEXAS

By



Ned McDaniel,  
Assistant.

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APPROVED MAY 10, 1947

  
ATTORNEY GENERAL